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Supreme Court of the United States

OCTOBER TERM, 1999

E SHAMARRA RICHARDS, INDIVIDUALLY AND AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF CHARLES A. RICHARDS, JR., AND AS GUARDIAN AND NEXT OF KIN OF SHANEE A. RICHARDS AND CHARLES RICHARDS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ Of Certiorari to the United States Court Of Appeals For The Third Circuit

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BRIEF OF
THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA
AND
PENNSYLVANIA TRIAL LAWYERS ASSOCIATION
AS AMICI CURIAE IN SUPPORT OF THE PETITIONER

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IDENTITY AND INTEREST OF AMICI CURIAE[1]

The Association of Trial Lawyers of America ("ATLA") is a voluntary national bar association of

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[1] Pursuant to Rule 37.6, Amici disclose that no counsel for a party authored any part of this brief, nor did any person or entity other than amici curiae, their members, or their counsel make a monetary contribution to the preparation or submission of this brief.

approximately 50,000 trial attorneys from across the country. ATLA members primarily represent injured victims of tortious conduct, as well as plaintiffs in civil rights actions and criminal defendants. ATLA members frequently represent members of the Armed Services and their families in their effort to obtain civil redress for injury. Many ATLA members, particularly those active in ATLA's Military Law Section, are themselves members of the Armed Services and are familiar with the special legal problems faced by service members.

ATLA believes that the right to seek just compensation for negligently or wrongfully inflicted injury is a fundamental element of our civil justice system. That service members are deprived of a remedy for governmental negligence which is afforded other citizens is a grave inequity. The fact that many service members are presently called upon to make the ultimate sacrifice for their country heightens the need to ensure their fair treatment under the law.

The Pennsylvania Trial Lawyers Association ("PATLA") is a non-profit organization with a membership of 3,500 women and men of the trial bar of the Commonwealth of Pennsylvania. For 20 years, PATLA has promoted the rights of individual citizens by advocating the compensation of innocent victims, and the maintenance of a free and independent judiciary. The organization opposes, in any format, special privileges for any individual, group or entity.

Through its Amicus Curiae Committee, the Pennsylvania Trial Lawyers Association strives to maintain a high profile in the Commonwealth and federal courts by promoting, through advocacy, the rights of individuals and the goals of its membership.

Letters from both parties granting consent to the filing of this brief have been filed with this Court.

SUMMARY OF ARGUMENT

In *Feres v. United States,* 340 U.S. 135 (1950), the Judicial Branch fashioned a rule of new "common law" that on its face appeared to be inconsistent with statutory language enacted by Congress. Since that time the lowers courts have struggled to apply *Feres* in a way that would be predictable and fair. The battle to find logical and sound underpinnings for the *Feres* decision have continued over the life of the doctrine. The courts have repeatedly and distressfully noted the basic problem created by the fact that the ever-changing justifications for ignoring the clear statutory language have rendered the decision of dubious value.

The basic inconsistencies of this doctrine were set forth in detail by Justice Scalia in a 1985 dissenting opinion that was joined by three other members of the Court. *United States v Johnson,* 481 U. S. 681, 692 (1985) (Scalia, J., dissenting). The continuing nature of the problem was recently recognized in exhaustive opinions from the Second and Ninth Circuits. *Dreier v United States*, 106 F.3d 844 (9th Cir. 1996); *Taber v Maine*, 67 F.3d 1029 (2d Cir. 1995).

Finally, in the case which the petitioner now seeks to bring before the Court, the opinion below, as well as four judges of the Third Circuit who would have granted en banc consideration, joins the chorus of federal judges who have throughout the existence of this doctrine urged this Court to reconsider the need, propriety and desirability of this doctrine, particularly in light of its questionable foundation.

There can be little dispute that the circuits have and are continuing to apply differing standards to the application of the doctrine and that the treatment of an individual's claim will often depend on the circuit where his cause of action is considered. There can also be little dispute that the doctrine has and continues to be subject to reasoned, logical and constant criticism, largely because of its unfairness, changing

justifications and ignoring of what would appear to be clear statutory language. Despite its age the doctrine remains as troubled and questionable as the day it was announced and this is perhaps precisely because its basic foundations were wrong from their inception.

In light of the conflict in the circuits, the lack of clarity in the rule of law to be applied and the fundamental incorrectness of this doctrine, amici would respectfully suggest that the Court grant the petition for certiorari to either abolish this doctrine or render an opinion that can be fairly and consistently applied to those service members and their families who have and will suffer serious injuries as the result of governmental employees negligence.

REASONS FOR GRANTING THE PETITION

I. THE FEDERAL CIRCUITS ARE CONFUSED AND HOPELESSLY IN CONFLICT. AS A RESULT THEY ARE APPLYING HUGELY DIFFERING STANDARDS TO WHAT IS SUPPOSEDLY A UNIFORM RULE OF LAW.

As set forth by the judges whose opinion is being appealed and who held that Feres barred the plaintiff's suit

> [W]e are left with a counter-intuitive and inequitable result simply because of Private Richards's military status. It is because *Feres* too often produces such curious results that members of this court repeatedly have expressed misgivings about it. . . . Again, we express this concern and note that the result we reach does not actually advance the philosophy behind *Feres*.

Richards v United States, 176 F.3d 652 at 657-58 (3rd Cir. 1999).

Such misgivings have not been limited to the Third Circuit but have been echoed by Justices of this Court and

other circuits and have lead to a plethora of varying approaches to this troubled doctrine. *See United States v Johnson,* 481 U.S. 681, 692 (1985) (Scalia, J., dissenting); *Day v Massachusetts Air Nat'l Guard,* 167 F.3d 678 (1st Cir. 1999); *Taber v Maine, supra.* (2d Cir. 1995). These approaches have caused a non- uniformity of decision leading to conflict among the circuits and unequal treatment of servicemen and their families. This is particularly troubling in light of the fact that the supposed need for uniformity formed a primary justification for the doctrine. A very brief review of some of the case law will demonstrate the clear split in the circuits.

Only three years ago, the Ninth Circuit in *Dreier v United States,* 106 F.3d 844 (9th Cir. 1996), addressed a situation where an off-duty serviceman was injured on the base due to a dangerous condition of the land in an area that was restricted to military personnel. The court found the *Feres* doctrine did not apply because the plaintiff was not in any real way subject to the compulsion of military orders, nor was he performing any sort of military mission. The court authored an extremely lengthy opinion directly noting that its opinion and earlier opinions of the Ninth Circuit were likely in conflict with decisions of other circuits. *Id.* at 854 n.9.

In *Taber v Maine,* 67 F.3d 1029 (2d Cir. 1995), the Second Circuit found itself forced "into that singular tangle of seemingly inconsistent rulings and rationales known as the *Feres* doctrine." *Id.* at 1032. After recognizing the "willful and arguably misguided origins" of the doctrine, *id.* at 1039, and acknowledging that it did not have the power to abolish the doctrine, the court attempted through lengthy analysis to find some basis for consistently applying the doctrine. Ultimately, the court held that Feres was inapplicable to the plaintiff's suit. However, the court added,

> [W]e would be less than candid if we did not admit that the *Feres* doctrine has gone off in so many different

> directions that it is difficult to know precisely what the doctrine means today.

Id. at 1032.

In *Parker v United States*, 611 F.2d 1007 (5th Cir. 1980), the court held that an off-duty serviceman, who was injured on base while driving a civilian vehicle towards his home off the military reservation, was not performing any military function and therefore the *Feres* doctrine did not bar an FTCA claim.

In contrast to the above opinions, the First Circuit in *Lauer v United States*, 968 F.2d 1428 (1st Cir.), cert. denied, 506 U.S. 1033, 113 S. Ct. 812 (1992), found the doctrine to preclude a claim by an off-duty serviceman who was injured off base on a road maintained by the Navy. This gentleman was not engaged in any military mission or in any real sense subject to the compulsion of military orders, nor was he acting within the scope of his employment. His claim was nevertheless held to be precluded by *Feres*.

The Eighth Circuit in *Miller v United States*, 643 F.2d 481 (8th Cir. 1981)(en banc), held that an off-duty serviceman performing off-duty work for a private contractor was barred from recovery by the *Feres* doctrine because the power line that his ladder touched was maintained by the Army. Again, this gentleman was not acting within the scope of his employment nor subject in any real sense to the compulsion of military orders. Nevertheless, his claim was also held to be barred under the *Feres* doctrine.

While lawyers could parse syllables about the differing facts of these cases, there can be little question that different rules were and are being applied by the different circuit courts. These rules of decision are unquestionably outcome determinative and cause a complete lack of uniformity in the decisions with regard to whether a serviceman or his surviving family can pursue a claim for damages.

Certainly the plaintiff in the case at bar was not engaged in activities that fell within the scope of his military employment. Nor was he in any real way subject to the compulsion of military orders or performing a military mission at the time of the accident. He was off-duty and driving home on a roadway maintained by the state, Kentucky Highway 1638. Yet in the 3rd, 1st and 8th circuits he would be barred from proceeding, while in the 2d, 5th and 9th circuits his claim would go forward. This is only a small sample of the conflicting decisions and, rhetorical machinations aside, it beggars reason to state that plaintiff's claim or those of any service members or their families will receive evenhanded, similar treatment in the federal circuits.

This case and the *Feres* doctrine itself represent the classic case of a clear conflict in the circuits with regard to a doctrine whose raison d'être is supposed to be uniformity of application of the law. As such it is imperative that this court grant certiorari to resolve this conflict to assure that those who serve their country receive a fair and uniform application of the law.

II. THE TEST OF TIME HAS DEMONSTRATED THAT THE *FERES* DOCTRINE, DUE TO ITS UNSUPPORTABLE AND ILLOGICAL UNDERPINNINGS, SHOULD BE ABOLISHED.

In 1946 the Congress passed the Federal Tort Claims Act, (hereinafter referred to as the FTCA), 28 U.S.C.A. § 2671 *et seq*. The FTCA stated that, absent certain specifically defined exceptions, it applied to personal injury caused by an employee of the Government while acting within the scope of his employment. 28 U.S.C.A. § 1346(b). Among the areas specifically considered and legislated upon by the Congress with regard to the FTCA's coverage was a provision limiting military liability. 28 U.S.C.A. § 2680(j). It

was and is therefore clear that Congress had considered application of the Act to the military.

Despite these facts and the clear wording of the statute, the Court determined that Congress did not mean what it had said and that the FTCA should be read to include further exceptions for the military than those enacted by Congress. These exceptions, in essence drafted and legislated by the Court, are what have come to be known as the *Feres* doctrine.

Unfortunately, because courts are not designed to function as legislative bodies, the need for and ramifications of such a doctrine could not be fully evaluated and considered prior to the Court's decision. As a result of this, it soon became evident that the rationales for Feres, even putting aside the direct conflict with the statute, did not bear up under logical and reasoned scrutiny.

The first factor, which concerned the fact that military personnel already received certain benefits, ran directly afoul of another decision of the Court as well as the fact that neither the FTCA or the benefits statutes made even the slightest mention of the desire and need for such an exclusivity provision. *Brooks v United States*, 337 U.S. 49 (1949). Further, such a provision could be easily stated and was one with which the drafters of the FTCA could be fairly said to be acquainted with if they desired to enact such a provision. *See*, 28 U.S.C.A. §§ 2672, 2676, and 2679. In fact, in the decision of *Brooks v United States, supra*, the Court had upheld the bringing of an FTCA claim by a member of the military where he had received such military benefits.

The second factor, that the creation of a cause of action for a peculiarly governmental activity should not be treated in the same manner as a private cause of action because private individuals do not raise armies, though supposedly based on the text of the statute, was also soon discredited by the decisions of the Court. *See Rayonier v*

United States, 352 U.S. 315 (1957); *Indian Towing v United States*, 350 U.S. 61 (1955). This was not surprising in light of the fact that to accept this premise one had to ignore the fact that Congress had carefully crafted exceptions to the FTCA, not only for the military but for other peculiarly governmental functions. *See, e.g.*, 28 U.S.C.A. §§ 2680 (b), 2680 (c), 2680 (f), and 2680 (j).

The third factor, the need for the application of a uniform federal rule, again could not be reconciled with the statute, the decision in *Brooks* or the fact that other areas of peculiarly governmental functions were going to be treated under state laws.

Further, no uniform federal tort law was being developed. Rather, some servicemen received both state law determined and military determined benefits while others received no tort benefits at all. *Brooks v United States, supra*; *United States v Brown,* 340 U.S. 110 (1954).

In light of the above difficulties with the doctrine's factors, a post hoc justification for *Feres* was created by saying that noninterference with military discipline was one of the real concerns for the doctrine that Congress had forgotten to enact. While perhaps a laudable goal, the fact that the courts would have to consider and inquire into the same type of decisions made by the military with regard to injuries caused to civilians made this basis, like the others, a rather illogical and inconsistent underpinning for the doctrine. *Taber v Maine,* 67 F.3d 1029 (2d Cir. 1995).

So, in *United States v Johnson*, 481 U.S. 681 (1987), the Court came back to the original *Feres* factors with the exception that it left out the discredited argument on individual liability, the only factor which was even arguably based on the text of the statute. Therefore, the doctrine was now supported by nothing that was based on the statute other than the Court's determination that the FTCA did not mean

what it said. Obviously the same problems, as discussed above, exist with the present Court-legislated determinations.

This is precisely why the doctrine having come full circle with some slight modification has still left the circuit courts with the unworkable and unsupportable task of applying the *Feres* doctrine, a task which has caused them to repeatedly suggest that the Court review and perhaps abolish the doctrine. *Taber v Maine, supra*; *Day v Massachusetts Air Nat'l Guard,* 167 F.3d 678 (1st Cir. 1999); *Monaco v United States,* 661 F.2d 129, 131-132, 134, n.4 (9th Cir. 1981).

Amici would suggest that at the foundation of the doctrine's problem is the fact that the Court was attempting to legislate exceptions to a statute which simply had not been enacted. It very well may be and is perhaps more likely that Congress was not as ignorant and oblivious as suggested by the Court. Rather, in light of the wording of the statute and the exceptions enacted by Congress, Congress considered many of the problems that have arisen with the *Feres* doctrine and determined that the type of exceptions enacted by the Court would cause such inconsistency, illogic and unfairness to servicemen and women that they should not be enacted.

Of course, this we will never know. However, what we do know is that Congress did consider application of the FTCA to the military and did not make any exceptions for coverage as enacted by the Court. We know that Congress did not even enact a simple exclusivity provision as could easily have been done if it believed the Court's enactments were necessary or desirable Finally, we know that the Act addressed exclusivity but did not include that enacted by the Court.

As repeatedly suggested by a multitude of federal courts, commentators and members of this court, this legislating by the Court which flew in the face of the statutory language was improper. For this reason, as well as

the unjust and inconsistent treatment the doctrine has visited upon the service members and their families, amici would respectfully request the Court to grant the petition for certiorari to reconsider and hopefully abolish this doctrine.

CONCLUSION

For the reasons stated above, Amici, The Association of Trial Lawyers of America and The Pennsylvania Trial Lawyers Association, respectfully urge the Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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